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IN THE

# Supreme Court of the United States

October Term, 1953

No. ~~279 MISC.~~ 118

CARLOS ALVAREZ GARCIA,

*Petitioner,*

*vs.*

H. R. LANDON, District Director, Immigration and Naturalization Service,

*Respondent.*

## PETITION FOR WRIT OF CERTIORARI.

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No. .....

CARLOS ALVAREZ GARCIA,

*Petitioner,*

*vs.*

H. R. LANDON, District Director, Immigration and Naturalization Service,

*Respondent.*

## PETITION FOR WRIT OF CERTIORARI.

Your petitioner, Carlos Alvarez Garcia, respectfully prays for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit in order to review its judgment, affirming a judgment of the United States District Court, holding that a Writ of *Habeas Corpus* releasing petitioner from custody should not issue.

### Jurisdiction.

The judgment of the Court of Appeals was entered on September 29, 1953; Petition for Rehearing denied, November 2, 1953. Its decision is unreported and therefore a copy of the opinion is attached hereto, made a part hereof and marked "Exhibit A."

The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

## Question Presented.

Whether the Act of October 16, 1918, 8 U. S. C. 137, as amended by Section 22 of the Internal Security Act, 1950, is constitutional, either *per se*, or at least as applied to petitioner.

More particularly, as applied, is it a Bill of Attainder and an *ex post facto* law, in violation of Article I, Section 9, clause 3 of the Constitution; and does it, additionally, offend due process, as applied, in contravention of the Fifth Amendment?

The question, accordingly, is in large part identical to that awaiting ruling by this Court in *Galvan v. Press*, this term, No. 407; certiorari granted October 12, 1953.

The Court of Appeals, in ruling against petitioner's challenge of the statute, relied upon its opinion in *Galvan*.

## Statutes Involved.

The Act of October 16, 1918, 8 U. S. C. 137, as amended, provides, in pertinent parts, as follows:

Section 137—same; subversive aliens

> "Any alien who is a member of any one of the following classes shall be excluded from admission to the United States:
>
> "* * *
>
> "(2) Aliens who at any time shall be or shall have been members of any of the following classes:
>
> "* * *
>
> "(c) Aliens who are members of, or affiliated with, (i) the Communist party of the United States, (ii) any other totalitarian party of the United States, (iii) the Communist Political Association, (iv) the Communist or other totalitarian party of any state

of the United States, of any foreign state, or of any political or geographic subdivision of any foreign state; (v) any section, subdivision, branch, affiliate, or subdivision of any association or party; or, (vi) the direct predecessors or successors of any such association or party, regardless of what name such group or organization may have used, may now bear or may hereafter adopt. . . ."

Section 137-3. Deportation of Subversive Aliens.

"(a) Any alien who was at the time of entering the United States, or has been at any time thereafter a member of any one of the classes of aliens enumerated in §137(2) of this title, shall, upon the warrant of the Attorney General, be taken into custody and deported in the manner provided in the Immigration Act of Feb. 5, 1917. The provisions of this section shall be applicable to the classes of aliens mentioned in §137 to 137-8 of this title, irrespective of the time of their entry into the United States."

## Statement of Facts Involved.

Petitioner, a Mexican national, was lawfully admitted to the United States for permanent residence on June 15, 1922 [HOD 1-1].[1] He has resided in this country continuously ever since, save for a period of a few hours on May 15, 1949, when he visited Tijuana, Mexico [HOD 1-1].

---

[1]Because of his poverty, petitioner cannot afford to have the record printed. In a separate petition he has requested that he be allowed to proceed on typewritten record. Accordingly, the bracketed citation: [HOD 1-1] refers to the (typewritten) Deportation Hearing Officer's Decision; the numerals refer to the page and paragraph respectively at which the reference may be found. For the convenience of the court, the Hearing Officer's Decision is a part of the file of the Immigration and Naturalization Service, No. A3 852 720, which has been designated on appeal as "Exhibit B."

On August 13, 1952, petitioner was arrested by officers of the Immigration and Naturalization Service on a deportation warrant, and was charged with unlawful residence in the United States [Tr. 1].[2] At an administrative hearing held on August 18, 1952, in Los Angeles, California, petitioner admitted membership in the Communist party during the years 1939-40 [Tr. 5, 9]. As a result of this testimony, petitioner was found to be subject to deportation pursuant to the provisions of the Act of October 16, 1918, 8 U. S. C. 137, and 137-3, as amended, on the ground that he had been a member of the Communist party prior to the date of his last re-entry [HOD 3]. An order of deportation was issued against petitioner pursuant to which he was, and still is, imprisoned and restrained of his liberty at the San Pedro detention station [HOD 1].

Petitioner married a legally resident alien in 1927, and is the father of ten children, all United States born, nine of whom are minors, totally dependent upon him for support [Tr. 5].

Since 1942, he has been employed as a boilermaker's helper by the Southern Pacific Railroad in Los Angeles, California, at approximately $60.00 to $70.00 a week, these earnings constituting the family's sole source of income [Tr. 13]. Petitioner owns his own home in Los Angeles, California, entirely clear of encumbrances [Tr. 13].

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[2]For the reasons indicated in footnote 1, *supra*, the bracketed citation: [Tr. 1] refers to the (typewritten) transcript of the administrative proceedings before the Deportation Hearing Officer. The numeral refers to the page number at which the reference may be found. Note: the transcript is also included within "Exhibit B" of the appellate record.

## Reasons Why Certiorari Should Be Granted.

In this, as in the *Galvan* case, *supra,* petitioner was a lawfully admitted resident of this country whose home had been established for over thirty years. As in *Galvan,* petitioner has been found subject to deportation under the provisions of 8 U. S. C. 137, 137-3, as amended,[3] upon the identical ground of *former* membership in the Communist party; which membership, incidentally, long preceded the passage of the Act now before this Court.

At present, petitioners in both cases are being unlawfully restrained of their liberty, having been confined in detention centers, because of their respective though identical deportation order.

Nowhere in the proceedings below, however, is there any claim or suggestion by the Government that the petitioner is presently, or since 1940 has been, a member of the Communist party, and in this respect, too, petitioner's case is like *Galvan's.*

Nonetheless, there are factual circumstances in petitioner's case which differ from those in *Galvan* in several significant respects:

Thus, whereas Galvan's affiliation with the Communist party seemingly arose from his ambition to become business agent of his union, petitioner's association with that organization was conceived in poverty and incubated by ignorance. The unrebutted testimony of petitioner indicates that in 1939 he had lost his job [Tr. 15]; that thereafter, with no income with which to support his wife and (then) six minor children, petitioner appealed for relief

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[3]This is the official citation for the Act of October 16, 1918, as amended, although both citations will be used interchangeably.

to an organization called the Worker's Alliance of America. His reasons for doing so appear as follows [Tr. 14]:

> "Q. Mr. Garcia, did you ever go to school? A. In Mexico, yes.
>
> Q. For how many years did you go to school? A. About three years.
>
> Q. Was that all the schooling you had? A. Yes, sir.
>
> Q. I call your attention to the fact I believe you testified that you were not working in the year 1939, is that a fact? A. Yes, sir.
>
> Q. Was there any reason why you went to the Workers Alliance meetings or to the place where they held their meetings in 1939? A. Yes, sir. My children needed some shoes and they told me where I could get them would be at the Workers Alliance, and they would help me, so that is why I went there.
>
> No, not then, but they would fight for us so that we would get what we need with the SRA.
>
> Q. Who is the SRA? A. That was the help that the state or the government would give.
>
> Q. Did the Workers Alliance help you to get shoes or food? A. Yes, sir."

Further testimony reveals that petitioner's association with the Communist party coincided in point of time and duration with his membership in the Workers' Alliance [HOD 1-2, 3]. The meetings of the two organizations were generally held at the same address, in the same meeting hall [Ex. 2, 3].[4] During mass meetings held by the

---

[4] [Ex. 2] is the seven-page (typewritten) exhibit offered by the government, and admitted as evidence, in the administrative proceedings herein, being the petitioner's sworn statement given to an investigating officer prior to his deportation hearing. The figure 3 designates the page of the exhibit to which reference is being made.

Communist party, and attended by petitioner, workers' grievances were discussed [Exs. 2-5]. But of even greater significance is that petitioner's association with both the Workers' Alliance and the Communist party terminated when he was finally able to secure re-employment [Tr. 12], a fact which serves to refute petitioner's interest in the Communist party and its alleged satellite, the Workers' Alliance.

The comparative illiteracy of petitioner (he required an interpreter at his deportation hearing because of his inability to comprehend English), the devastating impact of poverty and unemployment, the inevitable co-mingling of events, time and place during this period clearly show that petitioner resorted to affiliation with the Communist party as a relief agency through which he sought to alleviate the dire needs of his family. Cast in relation to Galvan's motivation of self-advancement, petitioner's case demonstrates even more clearly the real impact of this legislation.

Additionally, while Galvan's membership in the Communist party is set in 1944-46, the petitioner's is in 1939-40.

Accordingly, this period was, at its terminal point, two years before *Communist Party v. Peek*, 20 Cal. 2d 536 (1942), and four years before *Deming v. Communist Party*, 64 Cal. App. 2d 35 (1944), when the Supreme Court of California, and the District Court of Appeal of California in the area in which the petitioner was living, respectively, ruled that the Communist party had a right to be on the ballot in California; and when, as a result of these rulings, the Communist party was in fact upon the ballot in California, and when hundreds of California voters registered throughout California with the various

Registrars of Voters in the state, as members of the Communist party. Moreover, the period of membership by the petitioner in the Communist party was three years before the government, in *Schneiderman v. United States*, 320 U. S. 118, 148 (1943) ("with commendable candor") admitted "the presence of sharply conflicting views on the issue of force and violence as a party principle"; and when this Court reviewed the government's claims as to the nature of the Communist party and arrived at the view that there was a "tenable conclusion" (p. 157) that the Communist party did not advocate the violent overthrow of our government. Also, throughout the petitioner's affiliation with the Communist party, it was the law of the United States in the area in which petitioner was living, that the federal courts would not take judicial notice that force and violence is a party principle. (*Ex parte Fierstein*, 41 F. 2d 53 (C. C. A. 9, 1930) (and this Court so noted in *Schneiderman v. United States, supra*, at p. 148, footnote 30.)

Accordingly, it was in 1950, ten years after the petitioner's casual relationship to the Communist party that Congress *for the first time* enacted a statute declaring membership in the Communist party to be a ground for deportation. Hence, it was a decade after his termination of membership in the Communist party that the petitioner first learned that what he believed he had a right to do—a belief supported by then and thereafter numerous court decisions—namely, join the Communist party—constitutes a basis for an order of deportation, which to him "is a drastic measure and . . . the equivalent of banishment or exile. . . ." (From *Fong Haw Tan v. Phelan*, 333 U. S. 6, at 10, quoted in *Jordan v. De George*, 341 U. S. 223, 231.)

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The petitioner's case is more typical than Galvan's as to the manner of enforcement of Section 22 of the Act challenged; for it was in the '30s, rather than in the '40s, that so many, citizens and aliens alike, joined the Communist party, or one of its claimed affiliates; and did so not out of ideological sympathy with the Communist party, or from any knowledge of, or even remote apprehension of, its doctrines, but solely for need of food. The petitioner is a typical example.

But in still another way does petitioner's case depart factually from *Galvan*, namely, in the petitioner's membership in the Workers' Alliance, and the deportation hearing officer's conception of that organization.

Assuming the ability of petitioner to distinguish between the Communist party and the Workers' Alliance, it is far from clear that he understood the principles or purposes of either organization, or indeed, what constituted actual membership in any organization. Petitioner attended only eight or ten meetings of the Communist party [HOD 1-3]. In his decision, the hearing officer recalls petitioner's testimony that he never held office in the Communist party [Ex. B-1-3]; that he never paid dues to that organization [Ex. B-1-3] (although petitioner admitted paying dues to the Workers' Alliance) [Exs. 2-4]; that he had never been issued a membership card [HOD 1-3], nor could he recall having ever filed an application for one [Exs. 2, 3]; and that petitioner "terminated his membership . . . by not attending any further meetings . . ." [HOD 1-3].

But the deportation hearing officer also "noted that the Workers' Alliance was designated a Communist organization by the Attorney General pursuant to Executive Order 9835" [Ex. B-1-3], and rejects as irrelevant peti-

tioner's offer to show absence of membership in the Communist party "because of his admitted membership in the Workers' Alliance" [HOD 1-3]. Elsewhere, the hearing officer observes that petitioner "became a member of the Workers' Alliance of America in 1939 and thereafter remained a member until the end of 1940 or the beginning of 1941" [HOD 1-2].

At the time when the deportation hearing officer's opinion was rendered (Aug. 20, 1952) this Court had already expressed its doubts as to the validity of the Attorney General's designation as subversive an organization not first afforded notice or hearing, *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U. S. 123 (1950) (in which four concurring members of this Court even characterized the Attorney General's designation as violative of Due Process). Subsequently there came *Wieman v. Updegraff*, 344 U. S. 183 (1952), when this Court, at page 192, recognized as a "serious question" the designation of Communist front or subversive organizations without "fair notice to those affected," noting the "significance of the differing standards employed in the preparation of those lists and their limited evidenciary use under the Federal Loyalty Program"; and *United States v. Remington*, 191 F. 2d 246 (1951), at page 252, where the Court of Appeals for the Second Circuit frowned upon such lists as "a purely hearsay declaration by the Attorney General" having "no probative value."

It is not even certain that the deportation hearing officer realized that Executive Order 9835 was intended to pertain only to federal employees in the Government's Loyalty Program (*Joint Anti-Fascist Refugee Committee v. McGrath, supra; Wieman v. Updegraff, supra*). Nor is it any more clear to what extent the hearing officer's

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decision was influenced by petitioner's membership in the Workers' Alliance, although had these references not been considered important to the hearing officer, why would he have then laid such great stress on it?

In any event, both *Galvan* and the instant case demonstrate clear hardship. In *Galvan,* the Court of Appeals recognized it, stating: "the law is harsh . . ." (*Galvan v. Press,* 201 F. 2d 302, 306). In this case the hearing officer also acknowledged hardship commenting: ". . . it appears that his deportation would result in a serious economic detriment to his . . . spouse and . . . children" [HOD 2-2]. It is the obliquity of this law, however, that petitioner is without even that relief afforded deportable aliens in other categories of transgression (8 U. S. C. Sec. 155, 39 Stat. 889). Here the evidence shows conclusively that petitioner led an exemplary life prior to his present detention. There is no record of past criminal convictions [Tr. 13]. During World War II he did not seek exemption from military service, and indeed, he held himself in readiness for military call [Tr. 13].

Nevertheless, membership in the Communist party disqualifies him from applying under the lenitive provisions of the Act which empower the Attorney General with the right to suspend the deportation of an alien in certain cases of hardship (8 U. S. C. Sec. 155, 39 Stat. 889). Thus, does the Act of October 16, 1918, as amended, reach even the innocent—here, the petitioner's wife and nine minor children—by imposing upon them the unhappy choice of somehow thriving without his support, and without any prospect of his return, or to abandon their home, friends and way of life to emigrate with petitioner to what must be—for the children, at least—a strange and foreign country.

Accordingly, as applied to petitioner, the statute challenged is a Bill of Attainder and an *ex post facto* law, in effect; and the decision of the Court of Appeals below, ruling to the contrary, is probably at variance with the decisions of this Court in *United States v. Lovett*, 328 U. S. 303; *Cummings v. Missouri*, 4 Wall. 277, and *Ex parte Garland*, 4 Wall. 333.

This Court has recently noted its familiarity with these decisions; accordingly we reserve discussion of them as applied to the petitioner to another time, if that time ever comes, namely, when (or rather if) this Court grants certiorari.

Finally, and most importantly, in one other particular does the petitioner's case differ from *Galvan;* in the latter case there is the issue as to whether the Administrative Procedures Act applies to the Immigration Service, and whether or not Galvan was denied a hearing before an independent hearing officer within the requirements of the Administrative Procedures Act; more specifically, whether the repeal by Congress, by Public Law 414, 82nd Congress (66 Stat. at 820, par. 47, Sec. 403 of the Immigration and Naturalization Act), of the rider to the Independent Appropriations Act of 1951 (Public Law 843, 81st Congress, 64 Stat. 1044, 8 U. S. C. 1552), has the effect of restoring the ruling of this Court in *Sung v. McGrath*, 339 U. S. 33.

The foregoing point, raised in *Galvan* (see record from Clerk of the Court of Appeals in *Galvan v. Press*, p. 2 (Pet. for Writ of *Habeas Corpus* in behalf of Galvan), and p. 22 (Statement of Points to Be Relied Upon)) is to be urged in that case; it will not be presented in the instant case for it was not raised below.

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Accordingly, this Court may reverse the judgment in *Galvan* on this point, without reaching the grave constitutional questions also in issue therein and herein. The constitutional question does, however, require determination by this Court; for the fate of hundreds of aliens under orders of deportation or awaiting deportation hearings for past membership in the Communist party awaits a ruling by this Court on the constitutional issues.

This case would seem to offer an appropriate vehicle for such determination.

## Conclusion.

The writ of certiorari should be granted, and the order for deportation be set aside.

Respectfully submitted,

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HUGH R. MANES,
*Of Counsel.*

## EXHIBIT "A."

United States Court of Appeals for the Ninth Circuit.

Carlos Alvarez Garcia, also known as Carlos Garcia-Alvarez, Appellant, vs. H. R. Landon, District Director of Immigration and Naturalization, Appellee. No. 13,705.

Sep. 29, 1953.

Appeal from the United States District Court for the Southern District of California, Central Division.

Before Mathews, Healy and Orr, Circuit Judges.

Mathews, Circuit Judge.

Appellant, Carlos Alvarez Garcia, also known as Carlos Garcia-Alvarez, a Mexican alien, was lawfully admitted to the United States for permanent residence on June 15, 1922. Appellant has resided in the United States continuously since June 15, 1922, except for visits to Mexico between June 15, 1922, and May 15, 1949. After each such visit, appellant returned to and entered the United States. He last entered the United States on May 15, 1949.

On August 12, 1952, a warrant for appellant's arrest was issued by appellee, H. R. Landon, a district director of Immigration and Naturalization. That warrant stated, in substance, that, from evidence submitted to appellee, it appeared that appellant was deportable under the Act of October 16, 1918, as amended,[1] because, prior to May

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[1]1. As used in this opinion, the term "Act of October 16, 1918, as amended," means the Act of October 16, 1918, c. 186, 40 Stat. 1012, as amended by §22 of the Internal Security Act of September 23, 1950, c. 1024, 64 Stat. 1006-1010, 8 U. S. C. A. §§ 137 to 137-8. The Act of October 16, 1918, as amended, was repealed by §403(a) of the Immigration and Nationality Act of June 27, 1952, c. 477, 66 Stat. 279, effective December 24, 1952, but this case is not affected by the repeal. See §405(a) of the Immigration and Nationality Act, 66 Stat. 280.

15, 1949, he was a member of the Communist Party of the United States.[2] Under that warrant, appellant was arrested at Los Angeles, California, on August 13, 1952. A hearing was had at Los Angeles on August 18, 1952.[3] On August 20, 1952, the hearing officer (Wade H. Westmoreland) rendered a decision to the effect that appellant was deportable under the Act of October 16, 1918, as amended, because prior to May 15, 1949, he was a member

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[2]Section 1 of the Act of October 16, 1918, as amended, 64 Stat 1006, 8 U. S. C. A. §137, provided: "That any alien who is a member of any one of the following classes shall be excluded from admission to the United States: * * *

"(2) Aliens who, at any time, shall be or shall have been members of any of the following classes: * * *

"(C) Aliens who are members of or affiliated with (i) the Communist Party of the United States * * *"

Section 4(a) of the Act of October 16, 1918, as amended, 64 Stat. 1008, 8 U. S. C. A. §137-3(a), provided: "Any alien who was at the time of entering the United States, or at any time thereafter, * * * a member of any one of the classes of aliens enumerated in section 1(2) of this Act [8 U. S. C. A. §137(2)], shall, upon the warrant of the Attorney General, be taken into custody and deported in the manner provided in the Immigration Act of February 5, 1917. The provisions of this section shall be applicable to the classes of aliens mentioned in this Act [8 U. S. C. A. §137 to 137-8], irrespective of the time of their entry into the United States."

[3]Appellant testified at the hearing and, in the course of his testimony, admitted that he was a member of the Communist Party of the United States on October 29, 1940. Also received in evidence at the hearing was a statement made under oath by appellant to Austin E. Moe, an investigator and immigrant inspector of the Immigration and Naturalization Service, on June 19, 1952, and signed by appellant on August 13, 1952. In that statement appellant admitted that he was a member of the Communist Party of the United States "in 1939 up to 1940, for two years."

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of the Communist Party of the United States.[4] Appellant appealed from that decision, but the Board of Immigration Appeals dismissed that appeal on October 23, 1952. Accordingly, on October 29, 1952, the Attorney General, by Albert Del Guercio, an acting district director of Immigration and Naturalization, issued a warrant commanding the district enforcement officer at Los Angeles or any officer or employee of the Immigration and Naturalization Service to deport appellant to Mexico. Under that warrant, appellant has been detained in custody of an officer or officers of the Immigration and Naturalization Service at Los Angeles since October 29, 1952.

On December 1, 1952, appellant petitioned the United States District Court for the Southern District of California for a writ of habeas corpus. Thereupon, on December 1, 1952, the District Court issued an order requiring appellee to show cause why a writ of habeas

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[4]The hearing officer found that appellant "voluntarily became a member of the Communist Party of the United States at Los Angeles, California, about or during 1939 and maintained that membership continuously for a period of approximately two years thereafter." Thus, in effect, the hearing officer found that, on and after May 15, 1953—the date of appellant's last entry into the United States—appellant was a member of one of the classes of aliens enumerated in §1(2) of the Act of October 16, 1918, as amended, 64 Stat. 1006, 8 U. S. C. A. §137(2), namely, an alien who had been a member of the Communist Party of the United States. See footnote 2.

corpus should not be granted. Appellee filed a return,[5] appellant filed a traverse, and the District Court entered a judgment discharging the order and denying the petition. This appeal is from that judgment.

Appellant contends that the Act of October 16, 1918, as amended, was unconstitutional; that the evidence received as the hearing on August 18, 1952, was "insufficient to sustain the deportation charge"; that appellant "was not given a fair and impartial hearing"; that the hearing on August 18, 1952, "was not legally conducted"; that "the procedure required by law was not followed"; and that evidence not disclosed to appellant or his counsel was considered by the hearing officer in arriving at his decision "thus rendering the hearing unfair."

There is no merit in any of these contentions. The Act of October 16, 1918, as amended, was constitutional.[6] The return and exhibits attached thereto[7] showed that the

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[5]Two exhibits (A and B) were attached to and made part of the return. Exhibit A was a copy of the warrant of deportation issued on October 29, 1952. Exhibit B consisted of originals or certified copies of the following documents: Appellant's statement of June 19, 1952, mentioned in footnote 3; the warrant of arrest issued on August 12, 1952; a transcript of proceedings had and evidence received at the hearing on August 18, 1952; the hearing officer's decision; the dismissal of appellant's appeal from that decision; and the warrant of deportation. Exhibits A and B are in the record on appeal filed here on February 12, 1953, but are not in the "transcript of record" filed here on March 26, 1953.

[6]See Galvin v. Press, 9 Cir., 201 F. 2d 302, 305, and cases there cited.

[7]See footnote 5.

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hearing officer's decision was amply supported by evidence, including appellant's own testimony;[8] that appellant had a fair and impartial hearing on August 18, 1952; that that hearing was legally conducted; that the procedure required by law was followed; and that the hearing officer's decision was based on evidence received in the presence of, and fully disclosed to, appellant and his counsel. Nothing to the contrary was alleged in the petition or in the traverse.

The petition stated that appellant's detention was unlawful, but that was a mere statement of a legal conclusion. Neither the petition nor the traverse stated any fact or facts warranting that conclusion or entitling appellant to a writ of habeas corpus.

Judgment affirmed.

(Endorsed:) Opinion. Filed Sep. 29, 1953. Paul P. O'Brien, Clerk.

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[8]See footnote 3.